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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended	)	CC Docket No. 96-149

COMMENTS OF WORLDCOM, INC.

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November 29, 2000

TABLE OF CONTENTS

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Introduction and Executive Summary

In the Non-Accounting Safeguards Order,[1/] the Commission correctly interpreted section 271 of the Telecommunication Act of 1996 ("the Act" or "the Telecommunications Act") to bar the Bell Operating Companies ("BOCs") from providing in-region interLATA information services until they have obtained section 271 authorization. Non-Accounting Safeguards Order ¶ 57. Nothing has changed since. Nor could it. The plain language of the Act, its historical genesis, and its purposes all show that the Commission's interpretation was correct.

Section 271(a) of the Telecommunications Act requires BOCs to open their local markets to competition before they are allowed to provide in-region "interLATA services." The Act defines interLATA services broadly as "telecommunications between a point located in a local access and transport area and a point located outside such area." 47 U.S.C. § 153(21). Because

1/ Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, 11 FCC Rcd 21905 (1998).

information services necessarily are carried "via telecommunications," they constitute interLATA services. Indeed, sections 271(g) and 272(a)(2)(B) both explicitly refer to information services as interLATA services. Information services plainly are covered by section 271(a).

Moreover, section 271(b)(3) and section 271(g) explicitly permit the BOCs to provide some specified information services before they have opened their local markets. By explicitly permitting BOCs to provide particular information services, the Act underscores that BOCs are not permitted to provide other interLATA information services until they have met the requirements of section 271. Thus, regardless of whatever else is encompassed within section 271's ban on BOC provision of interLATA services, there can be no doubt that information services are encompassed within that ban. This is the only interpretation consistent with sections 271(b)(3) and 271(g).

The historical genesis of the Act also shows that section 271 covers information services. Prior to passage of the Act, the BOCs' provision of interLATA services was governed by the Modification of Final Judgment ("MFJ") which forbade BOCs from providing interexchange telecommunications services, including information services. When Congress passed the Telecommunications Act it altered some aspects of the MFJ but kept others intact. When Congress altered pre-existing restrictions, however, it did so explicitly. Congress did not explicitly eliminate the restriction governing information services (with the exception of those information services listed as incidental interLATA services). To the contrary, Congress continued the pre-existing restrictions on interexchange telecommunications services through section 271's restriction on interLATA services.

Finally, Congress' decision to extend the MFJ's restrictions on interLATA information services was driven by critical policy considerations that powerfully support the Commission's construction of the Act. If the BOCs were free to provide interLATA information services while maintaining their monopoly control over local telecommunications facilities, they could leverage that monopoly control to information services, precisely because those services are carried by telecommunications. Additionally, Congress believed that the possibility of escaping this restriction would serve as an incentive for the BOCs to open their local markets. Rather than continuing the process of opening their local markets, however, Verizon and Qwest seek to circumvent the process by reinterpreting section 271 to exclude information services. This attempt is not only inconsistent with the language of section 271 but undermines its fundamental purpose.

Argument

I. THE ACT UNAMBIGUOUSLY TREATS INTERLATA INFORMATION SERVICES AS A KIND OF "INTERLATA SERVICE."

A. Definitions In The Act Demonstrate That Section 271 Encompasses Information Services Provided Over BOC Owned, Leased, Or Resold InterLATA Telecommunications Facilities.

Section 271 of the Act prohibits BOCs from "provid[ing] interLATA services" until they have met the requirements of that section. 47 U.S.C. § 271(a). When a BOC provides information services and owns, leases or purchases through resale the interLATA telecommunications facilities over which the information travels, it provides interLATA service within the meaning of section 271.

The Act defines interLATA services as "telecommunications between a point located in a local access and transport area and a point located outside such area." 47 U.S.C. § 153(21). The Act defines information services as services that offer "a capability for generating, acquiring, storing . . . information via telecommunications." 47 U.S.C. § 153(20) (emphasis added). By definition, then, when those telecommunications are interLATA telecommunications, the information service is an interLATA service. As the Commission concluded, "interLATA information services are provided via interLATA telecommunications transmissions and, accordingly, fall within the definition of interLATA service." Non-Accounting Safeguards Order ¶ 56. See also id. ¶ 122 ("Whenever interLATA transmission is a component of an information service, that service is an interLATA information service, unless the end-user obtains that interLATA transmission service separately, e.g., from its presubscribed interexchange provider.").[2/]

Verizon and Qwest's argument to the contrary is based on the fact that the Commission in its Universal Service Report to Congress, 13 FCC Rcd 11501, 11521 ¶ 41 (1998), observed that an ISP "does not provide telecommunications; it is using telecommunications." The BOCs argue that this observation is inconsistent with the Commission's conclusion in the Non-Accounting Safeguards Order that ISPs provide "interLATA services," since interLATA services are defined as "telecommunications," and section 271 prohibits BOCs from "providing" interLATA services except as specified in that section. Since ISPs "use" telecommunications services but do not

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2/ If the end user obtains the interLATA telecommunications separately from an interexchange carrier then the Commission has concluded that the service the BOC is providing is not interLATA in nature. The end user instead is obtaining an intraLATA service from the BOC and an interLATA service from the IXC.

themselves "provide" them to end users, Verizon and Qwest argue, the ISPs are not providing interLATA services.

The BOCs' claim to find a conflict between the Report to Congress and the Non-Accounting Safeguards Order is based on a strained and implausible reading of the statute. Whether the BOC is providing telecommunications is not the relevant inquiry under section 271. The relevant inquiry is whether the BOC is providing interLATA services. And because telecommunications is, by definition, a necessary component of information services, interLATA information services are indisputably a kind of interLATA service. And because the end user purchases the information services from the BOC, there also can be no doubt that it is the BOC that is providing those information services. That is more than enough to bring interLATA information services within the scope of section 271.

The BOCs' response assumes that the definition of interLATA services includes a requirement that the provider of interLATA services also must "provide" telecommunications "services" to an end user. To be sure, when a BOC provides information service, it is not "offering telecommunications for a fee directly to the public" – the definition of a telecommunications service. 47 U.S.C. § 153(46). But neither the word "provide" nor the word "services" appear anywhere in the definition of interLATA services. The classification of a service as an "interLATA service" simply does not turn on whether the user of the service itself is being directly provided with the telecommunications. Thus the statute plainly contemplates that a business might "provide" interLATA services even though it does not itself "provide" telecommunications "services," or even "provide" telecommunications, directly to the end user.

Moreover, the word "provide" has an especially broad meaning in section 271, a meaning the word does not have when the Commission in its Report to Congress explained that ISPs do not "provide" telecommunications services for purpose of universal service. The Commission has explained that "we interpret the term 'provide' in sections 271(a) and (b) in view of the goals Congress sought to achieve by enacting these provisions." AT&T Corp. v. Ameritech Corp., 13 FCC Rcd 21,438 at 21,462 ¶ 30 (1998). Thus, "in order to determine whether a BOC is providing interLATA service within the meaning of section 271, we must assess whether a BOC's involvement in the long distance market enables it to obtain competitive advantages, thereby reducing its incentive to cooperate in opening its local market to competition." Id. at 21,465 ¶ 37.[3/]

The D.C. Circuit agreed with this standard. It found the Commission's interpretation of "provide" to be "clearly reasonable in the specific context of § 271." U.S. West. v. FCC, 177 F.3d 1057 (D.C. Cir. 1999). It added that "[a] narrow reading [of provide] would thus tempt the BOCs to defer conduct that Congress hoped to accelerate – acts facilitating the development of competition in the intraLATA market." Id. As will be shown infra, Verizon and Qwests' reading of the statute would indeed defer conduct Congress hoped to accelerate. The

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3/ The Commission applied this standard to invalidate deals between U.S. West, Ameritech and Qwest (then, strictly an interLATA provider) under which the BOCs would market Qwest's long distance service to their customers. The BOCs argued that this was permitted by section 271 because Qwest, not the BOCs, would be providing the long distance service. The Commission properly rejected this argument, because the arrangements between the BOCs and Qwest provided significant competitive advantages to the BOCs, particularly the ability to provide one stop shopping. Id. at 21,475 ¶ 52. The D.C. Circuit affirmed. U.S. West. v. FCC, 177 F.3d 1057 (D.C. Cir. 1999). Under similar reasoning, BOC provision of interLATA information services is not permitted under section 271. As with the deals invalidated in U.S. West, provision of interLATA information services would give the BOCs a significant competitive advantage. See infra § III.

Commission's reading of the statute in the Non-Accounting Safeguards Order, on the other hand, would help accelerate that conduct.

In sum, there is nothing contradictory about a statement that makes clear that ISPs are not subject to access charges because they are not themselves common carriers providing telecommuncations services, and a statutory requirement that assures that BOCs not be allowed to leverage their control over bottleneck facilities onto services that depend upon use of those facilities by providing interLATA services before they have opened up their local markets as required by section 271.

B. Section 271(g) Shows That The BOCs Are Forbidden From Providing Most Information Services.

Even if the Act's definitional sections were capable of the interpretation proposed by Verizon and Qwest, other provisions of the Act make it unambiguously clear that Congress intended interLATA information services to be included in the restrictions imposed on BOC provision of "interLATA services." To begin, section 271 itself unambiguously demonstrates Congress' intention to include interLATA information services within the restrictions contained in that section of the Act. Section 271 explicitly exempts some information services from its general directive regarding interLATA services. It thus makes clear that other information services are covered by that section.

Thus, under section 271(b)(3), a BOC "may provide incidental interLATA services" even before the BOC has opened its local markets to competition. Incidental interLATA services are defined in section 271(g) to include services that are indisputably information services: information storage and retrieval services and some limited Internet services, for example. By

designating those services as incidental interLATA services a BOC is permitted to provide, section 271(g) demonstrates that Congress understood a BOC that provides information services is also providing interLATA services. This disposes of the BOC position that information services are entirely distinct from interLATA services.

Even more important, the fact that section 271(g) specifically exempts certain information services from the scope of section 271 demonstrates that other information services fall within that scope. If section 271 did not cover information services, as the BOCs contend, Congress would not have needed to exempt specific information services from that section.

This point is conclusive. The only statutory interpretation that is consistent with section 271(g) precludes BOCs from providing interLATA information services that are not specifically exempted by that provision. Whatever the merits of the BOCs' argument as to the implications of the Report to Congress, that Report did not repeal section 271(g). If the Report were somehow inconsistent with section 271(g) – and it is not – it is the conclusions of the Report that would have to be modified. Verizon and Qwest entirely ignore section 271(g) in their appellate brief.

Moreover, section 271(h) states that the exceptions in section 271(g), including the exceptions for specified information services, are "to be narrowly construed." This underscores Congress' view of the importance of maintaining a broad interpretation of section 271's bar on BOC provision of interLATA services – a goal that would be entirely frustrated if section 271 were read not to extend to interLATA information services generally.

In sum, although the Act is not a model of clarity in many respects, it is clear and unambiguous that section 271 precludes BOCs from providing interLATA information services until they have opened their local markets to competition.[4/]

C. The Provisions Of Section 272 Prove That the Term "InterLATA Services" Includes Information Services.

Section 272 further demonstrates that a BOC provides interLATA service when it provides information services. Section 272 requires that a BOC establish a separate affiliate when it "provide[s]" interLATA service. 47 U.S.C. § 272(a)(1). A separate affiliate is required both to provide: (1) "[o]rigination of interLATA telecommunications services," and (2) "interLATA information services." 47 U.S.C. §§ 272(a)(2)(B) & (C). Both of these separate affiliate requirements show the fallacy of the BOCs' position that information services are not interLATA services.

First, the requirement that a BOC establish a separate affiliate to provide "interLATA telecommunications services" demonstrates that telecommunications services are not the only kind of interLATA services. As the Commission explained, "if Congress had intended the term 'interLATA services' to include only interLATA telecommunications services, its use of the term

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4/ The Commission has indicated that the BOCs may provide purely intraLATA information services, including the intraLATA component of interLATA services. In the Non-Accounting Safeguards Order, the Commission concluded that "[w]hen a customer obtains interLATA transmission service from an interexchange provider that is not affiliated with a BOC, the use of that transmission service in conjunction with an information service provided by a BOC or its affiliate does not make the information service a BOC interLATA service offering . . . when such telecommunications and information services are provided, purchased, and priced separately." ¶ 120. In other words, when the end user who chooses the BOC as his ISP has a separate choice as to what provider will be the source of the interLATA telecommunication facilities over which the information will flow, the Commission has stated that the BOC is not providing an interLATA service.

"interLATA telecommunications services" in section 272(a) would have been unnecessary and redundant." Non-Accounting Safeguards Order ¶ 56. Verizon and Qwest do not disagree with this. They acknowledge that by requiring a separate affiliate for interLATA telecommunications services, section 272 suggests that the definition of "'interLATA services' is broader than 'interLATA telecommunications services.'" Brief of Bell Atlantic and Qwest in the D.C. Circuit, No. 99-1479 ("Br.") at 20. They contend, however, that the broader definition does not include information services. Rather, according to the BOCs, Congress limited the separate affiliate requirement to "interLATA telecommunications services" in order to exempt from that requirement telecommunications that do not constitute telecommunications services – telecommunications that are not offered to the public. Br. at 19. In particular, they assert that the separate affiliate requirement of section 272(a)(2)(B) does not apply to private line service. Br. at 20.

However, the BOCs provide no evidence for their unlikely argument that Congress expressly identified "interLATA information services" and "interLATA telecommunications services" in section 272 as a way to draw a distinction between private line services not subject to section 272 and telecommunications services that are subject to section 272. To begin, private line services are expressly subject to section 271 (see section 271(j)), and carriers do provide private line services on a common carrier basis. The distinction these BOCs draw therefore has little to recommend it either as a matter of statutory interpretation or policy – BOCs can abuse their monopoly in the provision of private line service every bit as easily as they can in the provision of other telecommunications.

More to the point, these BOCs ignore that section 272(a)(2)(B)'s treatment of "interLATA telecommunications services" is followed immediately by section 272(a)(2)C)'s treatment of "interLATA information services." The most obvious and straightforward reading of the two subsections in context, therefore, is that they are analyzing two different classes of "interLATA services," and not that the discussion of interLATA telecommunications services was attempting to exclude private line service from the Act's requirements. Section 272(a)(2)(B) thus strongly supports the proposition that a BOC that provides information services can also be providing interLATA services.

Second, section 272(a)(2)(C) requires that BOCs establish a separate affiliate to provide "interLATA information services." Whatever Congress' purpose in using the term "interLATA telecommunications services" in section 272(a)(2)(B), there can be no dispute that Congress' use of the term "interLATA information services" shows that information services can be interLATA services. In this respect, section 272(a)(2)(C) reinforces the language in section 271(g) referring to particular information services as interLATA services. In their appellate brief, the BOCs shift the focus away from the language "interLATA information services" because they have no way to explain it. Br. at 19-20. But that language undermines their entire argument.

D. Section 272(f) Does Not Support The BOCs' Position.

While studiously ignoring those statutory provisions that make clear that Congress intended information services to be included within "interLATA services," Verizon and Qwest nonetheless argue that their reading of section 271 is supported by section 272(f). Br. at 15. They are wrong. Section 272(f) establishes sunset dates for the separate affiliate requirements created by the Act. It states that the separate affiliate requirement for interLATA

telecommunications services generally will sunset 3 years after the BOC receives section 271 authorization. 47 U.S.C. § 272(f)(1). It then says that the separate affiliate requirement for interLATA information services generally will sunset four years from February 8, 1996. 47 U.S.C. § 272(f)(2). The first sunset date is tied to the date of section 271 authorization; the second is not. Verizon and Qwest would have the Commission infer from this that section 271 does not extend to interLATA information services. But this inference is unwarranted.

On its face, Section 271 extends to all interLATA services, which includes interLATA information services. The fact that another requirement, the separate affiliate requirement, differentiates between interLATA information services and interLATA telecommunications services has no bearing on this fact. If anything, as indicated above, the fact that Congress required a separate affiliate for the provision of interLATA information services as well as interLATA telecommunications services shows that Congress was expressly concerned about BOC provision of information services, thus explaining why it included these services within the scope of section 271.

Moreover, the BOCs' explanation for the different sunset dates in section 272 is extremely far-fetched. It has no support in the legislative history and indeed is inconsistent with that history. The Telecommunications Act grew out of a House that provided a single sunset date for the separate affiliate required to provide all interLATA services and a Senate bill that did not provide a sunset date for any services. See H.R. 1555, 104th Cong., 1st Sess., 246(k) (1995); S. 652, 104th Cong., 1st Sess., 102 (1995).[5/] The sunset date in the House bill was not tied to the

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5/ The Senate bill would have given the Commission the authority to grant exceptions from the separate subsidiary requirement. The Conference Report explained, however, that "the Senate [did] not intend that the Commission would grant an exception to the basic separate

date on which the BOCs obtained authorization to provide interLATA services. Yet even the BOCs would agree that some of those interLATA services – the interLATA telecommunications services – fell within the scope of the sections that later became section 271. The existence of a fixed sunset date thus implied nothing about the scope of those sections.

The Conference Committee altered the sunset date for the separate affiliate requirement for interLATA telecommunications services and tied that sunset date to section 271 authorization. It maintained a fixed sunset date for the separate affiliate requirement for interLATA information services. It offered no explanation for this differentiation. Certainly, Congress could not have intended to indicate its intent to remove interLATA information services from the scope of section 271 by maintaining a fixed sunset date for the interLATA information services separate affiliate. If this had been Congress' intent, it would have expressed that intent much more clearly.

Instead, the probable reason Congress differentiated between interLATA information services and interLATA telecommunications services in establishing sunset dates for section 272 separate affiliate requirements is that the requirement for interLATA telecommunications services applies only to in-region services, while the separate affiliate requirements for information services is not so limited. Because a BOC is required to use a separate affiliate to provide out-of-region information services that are not subject to section 271 (as well as in-

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subsidiary requirement of this section for any service prior to authorizing the provision of inter-LATA service under section 255 by the BOC seeking the exception." Conf. Report 104-458, 104th Cong., 2nd Sess. at 151 (1996) (emphasis added). Thus, prior to Conference, the Senate required a separate affiliate for information services as well as telecommunication services until a BOC obtained authorization to provide interLATA service. This hardly evidences an intent to exclude information services from the scope of section 271.

region services that are), Congress evidently decided it was not fair to the BOCs to link the sunsetting of the separate affiliate requirements to section 271 compliance. On the other hand, since both section 271 and section 272 addressed only in-region telecommunications services, Congress decided to link the sunsetting of the section 272 requirements directly to section 271 compliance.

In any event, whatever Congress' reason for the differing sunset dates, the language of section 271 is clear. The BOCs cannot avoid the requirements of that section based on far-fetched inferences from sunset dates elsewhere in the statute.

II. THE ANALOGOUS TREATMENT OF INFORMATION SERVICES UNDER THE MFJ POWERFULLY SUPPORTS THE COMMISSION'S CONSTRUCTION OF THE ACT.

Even if the statute were ambiguous on the treatment of information services as a form of interLATA services – and it is not – the practice under the MFJ powerfully supports the Commission's Order. Under Section Two of the MFJ, the BOCs were not allowed to provide interLATA information services. And, while the line of business restriction on all information services was lifted by the MFJ court in 1991,[6/] the BOCs remained subject to the Decree's prohibition on BOC "interexchange telecommunications services."

Critically, in the Gateway Services Appeal, the D.C. Circuit determined that a BOC that provided a gateway service over leased interexchange lines was providing telecommunications and so was subject to the MFJ restrictions. United States v. Western Elec. Co., Inc., 907 F.2d 160, 163 (D.C. Cir. 1990). In that case, the court considered the BOCs' right to provide information services under an MFJ provision that forbade the BOC's from providing

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6/ United States v. Western Electric Co., 767 F. Supp. 308 (D.D.C. 1991).

"interexchange telecommunications services." The BOCs therefore made arguments virtually identical to the arguments Verizon and Qwest advance here, insisting that when acting as ISPs they were not offering telecommunications services to customers because the telecommunications services were not separately identified or charged to customers – and thus did not fall within the MFJ's prohibition. Id. at 163.

The D.C. Circuit rejected this argument, explaining that the BOC was providing telecommunications even though those telecommunications were bundled with information services. The Court concluded that "when information services are . . . bundled with leased interexchange lines, the activity is covered by the decree." Id. That was the clear state of the law when Congress enacted the 1996 Act and provided a statutory basis for the central provisions of the MFJ. The Commission's interpretation of "interLATA services" as including "interLATA information services" is, in other words, identical to the interpretation adopted by the MFJ court. See Non-Accounting Safeguards Order ¶ 115 (interpretation "comports with MFJ precedent").

That fact strongly supports the Commission's interpretation. Section 271's prohibition on BOC provision of "interLATA services" generally mirrors the pre-existing restrictions of the MFJ. Where it does not, the Act says so explicitly. Section 271(b)(3), for example, allows BOCs to provide incidental interLATA services they could not provide under the MFJ. The Act also largely imports the definitions of "telecommunications," "telecommunications services," and "information services" from the MFJ.[7/] As the Commission concluded in its Report to Congress,

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7/ The distinctions in the Act also grow out of the distinction between basic services and enhanced services that the Commission made nearly 20 years ago in its Computer II order in which it determined that providers of enhanced services could not be regulated as common carriers under Title II but could be regulated under Title I. See, e.g., Amendment of § 64.702 of the Commission's Rules and Regulations, Second Computer Inquiry, 77 FCC 2d 384 (1980),

Congress intended these terms "to build upon frameworks established prior to the Act." Report to Congress ¶ 13.[8/] The pre-existing framework forbade BOC provision of interLATA information services. The Act left intact that prohibition. In sum, the MFJ law powerfully supports the Commission's conclusions that information services are interLATA services.

III. THE PURPOSES OF SECTION 271 SHOW THAT IT COVERS INFORMATION SERVICES.

This unambiguous statutory language and legislative history is powerfully supported by considerations of public policy. Section 271 aims to "bring additional competition to the long distance market" and to "facilitate entry by new entrants into the BOCs' local markets." AT&T Corp. v. Ameritech Corp., 13 FCC Rcd at 21,465 ¶ 36. Interpreting section 271 to encompass information services facilitates both of these goals. A contrary interpretation would undermine them.

BOCs that provide such information services before opening their local markets gain a significant competitive advantage. They can leverage their dominant position in local markets into control in the information services market. As long as the local loop remains a bottleneck

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modified on recon., 88 FCC 2d 512 (1981), aff'd sub. nom. Computer and Communications Industry Association v. FCC, 693 F.2d 198 (D.C. Cir. 1982), cert. den., 461 U.S. 938 (1983), aff'd on second further recon. FCC 84-190 (rel. May 4, 1984).

8/ See also Non-Accounting Safeguards Order ¶ 25 ("Congress intended sections 271 and 272 to replace the pre-Act restrictions on the BOCs contained in the MFJ); id. ¶¶ 116, 119 (relying on scope of restrictions in MFJ to interpret scope of section 271). Under the prior frameworks, as in the present framework, information services and telecommunications services were mutually exclusive terms. Report to Congress ¶ 13. The D.C. Circuit nonetheless concluded that under the MFJ, the BOCs could not provide information services that are bundled with telecommunications. The mutually exclusive nature of information services and telecommunications services under the Act thus cannot serve a basis for arguing that section 271 does not extend to information services that include a bundled telecommunications component.

facility, all wireline information service providers must make use of BOC loops to reach customers wanting information services. If a BOC is itself providing information services and bottleneck local telecommunications facilities, then it has an obvious incentive to discriminate against other information service providers in terms of the quality, timeliness and price of the access it provides to the loop. Thus, allowing BOCs to provide information services prior to opening their local markets risks BOC domination of the information services market. That is why the MFJ prohibited BOCs from providing interLATA information services that included a bundled telecommunications component.

Equally important, if information services are exempted from the scope of section 271, that section is much less likely to serve as an adequate incentive for the BOCs to open their local markets to competition. For the incentive offered by section 271 to be effective, the advantages BOCs gain from obtaining section 271 authorization must outweigh the costs of losing monopoly control over their local markets. Information services (and provision of the backbone over which that service travels) is a growing and attractive market, and by conditioning access to that market upon compliance with the requirements of section 271 Congress provided a powerful incentive to the BOCs to open their markets.

CONCLUSION

For the foregoing reasons, the Commission should re-affirm its determination in the Non-Accounting Safeguards Order that Section 271(a) precludes a BOC from providing in-region interLATA information service until the Commission has granted authorization pursuant to section 271(d).

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November 29, 2000

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